RECORD AND BRIEFS

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

DOUGLAS G. CAROOM*
SUSAN M. MAXWELL
BICKERSTAFF HEATH
DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
(512) 472-8021
dcaroom@bickerstaff.com

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER[1]

Pursuant to the Court's Orders dated March 20, 2017 and March 31, 2017, on June 9, 2017, the State of New Mexico filed its Exceptions to the First Interim Report of the Special Master (the "Report") in this original action, and its brief in support thereof. Various other New Mexico entities, including several governmental entities that have already participated in briefing as *amici curiae* in these proceedings, and several other entities now seeking leave to participate as *amici* for the first time, also filed exceptions to the Report. The City of El Paso ("City" or "El Paso") submits this *amicus curiae* brief in support of the State of Texas' Reply to the exceptions filed by the State of New Mexico and by various *amici curiae* entities from New Mexico.

INTEREST OF *AMICUS CURIAE*

The City of El Paso, Texas is located in the northern reach of the Chihuahuan Desert with less than eight inches per year of average annual rainfall. Its

[1] By Motion approved at its regularly scheduled meeting on July 25, 2017, the El Paso City Council approved the City's filing of this amicus brief. *Cf.* S. Ct. R. 37.4 (City not required to file motion for leave). Notice of El Paso's intent to file this amicus brief was also timely provided to counsel of record for all parties.

continued growth and prosperity depend upon having an adequate water supply, made up of both groundwater and Rio Grande Project surface water. In order to moderate its reliance on groundwater from the Hueco Bolson and to confront surface water shortages in drought years, El Paso has undertaken a water management strategy that promotes water conservation, maximizes surface water use, increases use of reclaimed water, and has developed desalination of brackish groundwater and potential future groundwater importation from other nearby groundwater basins in Texas.[2]

The continued availability of surface water is critical to El Paso's current and future water supply, and El Paso's only source of surface water is the Rio Grande Project ("Project"). El Paso currently has contracts with the El Paso County Water Improvement District No. 1 ("EPCWID") and the United States Bureau of Reclamation ("USBR") that entitle the City to receive approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Project. During years of partial supply, El Paso's municipal supply is reduced proportionately with EPCWID's irrigation supplies.

Actions by New Mexico that enable and institutionalize increased demands on Project water through groundwater pumping in New Mexico, affecting the

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[2] A description of El Paso's water resources, as well as past, current and planned water use, is available at: http://epwu.org/water/water_resources.html.

drain water and irrigation return flows that are part of Project water supply, remain a cause of serious concern to El Paso and Texas. Protecting the historical operation of the Project as embedded in Texas' rights under the Rio Grande Compact ("Compact") is a direct and sustained interest of all Texas users of Project water, including those such as El Paso that have invested heavily to secure contractual rights for this water supply. Addressing these issues is a matter of critical importance to the almost 750,000 residents of the region that depend upon El Paso and the Rio Grande Project for their water supply.

SUPPLEMENTAL STATEMENT

El Paso accepts and endorses the Jurisdiction and Statement set out in the Exception of the United States, and those included in the Reply to Exceptions by the State of Texas, and would further add the following.

Exceptions to the First Interim Report of the Special Master have been filed by the State of New Mexico, the State of Colorado, and the United States. Additionally, *amicus curiae* briefs in support of New Mexico's exceptions have been filed by the City of Las Cruces ("Las Cruces") and the Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"). Motions for leave to file *amicus curiae* briefs supporting New Mexico, with those accompanying briefs, have been filed by

New Mexico State University ("NMSU") and by the New Mexico Pecan Growers.

New Mexico takes the rather unusual position of acceding to the Special Master's recommendation that its Motion to Dismiss Texas' Complaint be denied, and also to the Special Master's recommendations on other motions, but urging the Court to reject the analysis and rulings that underlie those recommendations.

Several common themes emerge from the latest briefing of New Mexico and these New Mexico *amici*, including that: (a) New Mexico's jurisdiction and sovereignty over surface and groundwater below Elephant Butte Reservoir have been erroneously displaced; (b) the effect of the Special Master's recommendations is the "federalization" of New Mexico's surface and groundwater resources below Elephant Butte Reservoir, contrary to the intent of federal reclamation law; and (c) New Mexico law and the pending water rights adjudication proceeding in New Mexico should alone define the water rights of the United States and the Rio Grande Project.

El Paso supports the Reply by the State of Texas to these issues, and to others raised by the parties and New Mexico *amici*, and will not attempt to respond to all issues. Instead, El Paso provides information and authority not addressed by these other briefs, describing its Rio Grande Project water supply, its groundwater supply, and the interrelation of these two sources

to successfully preserve the Project water supply for all users.

SUMMARY OF ARGUMENT

New Mexico's proposal, that its Motion to Dismiss should be denied but the Special Master's underlying basis for that denial should be rejected, is illogical and contrary to the Court's intent in accepting the United States' suggestion that this underlying issue of compact construction be presented as a threshold issue, for resolution by a New Mexico motion to dismiss. *See* U.S. Amicus Br., December 2013, at 22-23.

The Report's analysis and recommendations would not have the effect of divesting New Mexico of its sovereignty or authority to regulate surface and groundwater resources below Elephant Butte Reservoir. Rather, they would simply impose limits on how New Mexico can exercise that authority. Specifically, New Mexico cannot allow its water users to "grab back" water that it has delivered into Elephant Butte Reservoir pursuant to the Rio Grande Compact, Act of May 31, 1939, Ch. 155, 53 Stat. 785, and New Mexico is responsible to ensure compliance with its Compact obligations. In fact, New Mexico's experience complying with the Pecos River Compact demonstrates that the exercise of such sovereignty is essential to achieving and maintaining compact compliance.

Recognizing that existing New Mexico water uses, which affect the drain water and irrigation return

flows that are part of Project water supply, will require contracts with the United States (and New Mexico's irrigation district under the Project, the Elephant Butte Irrigation District ("EBID")) for use of that water is not incompatible with New Mexico's state sovereignty and water management. El Paso's existing contracts for Project water supply actually demonstrate that such contracts can provide a valuable vehicle to preserve the Project water supply for other users.

New Mexico retains the authority to adjudicate and administer water rights in the Lower Rio Grande, including Project water rights, but New Mexico cannot take actions inconsistent with its obligations under the Rio Grande Compact as determined in this case. Like the adjudicated water rights in *Hinderlider v. La Plata River & Cherry Creek Ditch Company*, those rights and the state administration of them are subject to a compact's equitable apportionment. 304 U.S. 92, 110 (1938).

ARGUMENT

1. A ruling on the Report's underlying analysis is necessary.

The core legal issue in this interstate dispute is whether New Mexico's obligations under the Rio Grande Compact end with its delivery of water into Elephant Butte Reservoir. As noted by the Solicitor General, responding to the Court's invitation to brief Texas' Motion for Leave to File Complaint, Texas and

New Mexico differ over whether the Compact allows New Mexico to permit users in New Mexico to divert surface water and groundwater hydrologically connected to the Rio Grande in excess of the amount authorized for use in New Mexico under the Project. *See* U.S. Amicus Br., December 2013, at 22-23. The Solicitor General suggested inviting New Mexico to file a Rule 12(b)(6)-like motion to dismiss in order to allow presentation of this threshold issue and obtain an early ruling thereon.

New Mexico, now that it has the Special Master's recommendations, would prefer not to have the analysis supporting them. N.M. Br. at 12-13, 15.[3] The Court should reject this proposal. If New Mexico's legal position is correct, that its obligations to Texas under the Compact cease upon delivery of water into Elephant Butte Reservoir, then the entire case should be dismissed. If New Mexico is incorrect, then the case should proceed, within the framework of the resolution of this threshold issue.

2. The Report's analysis does not strip New Mexico of its sovereign authority over water within the State.

New Mexico and several New Mexico *amici* argue that the Report's analysis would deprive the State of New Mexico of its authority to regulate water rights

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[3] Except as otherwise noted, citations herein to a party's or amicus entity's brief are to their exceptions to the Report, filed on June 9, 2017.

and water use below Elephant Butte Reservoir. N.M. Br. at 16-29; Las Cruces Br. at 3-4; NMSU Br. at 24-30. El Paso disagrees. The Report states that New Mexico may not authorize its water users to "grab back" water that has been delivered to the Project. Report at 202. Such actions would prevent Texas from receiving the equitable apportionment accomplished by the Compact. Report at 210-11.

This is not an "abrogation" of New Mexico's sovereign authority. N.M. Br. at 25. It is a ruling that New Mexico may not exercise its sovereign authority in a manner that violates its obligations under the Compact and prevents achieving the Compact's equitable apportionment. That is not a new or radical concept; it is at the heart of much of the interstate water litigation heard by the Court. *See, e.g.*, *Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042 (2015); *Texas v. New Mexico*, 462 U.S. 554 (1983); *Hinderlider*, 304 U.S. at 106.

New Mexico's obligation is to exercise its sovereign authority to ensure that water deliveries under the Compact are made, and that such water arrives in Texas with no greater depletions by New Mexico water users than would have occurred in 1938 when the states entered into the Compact. To strip New Mexico of its sovereign authority over this water would, in fact, be a step that prevents, rather than promotes, New Mexico's compact compliance.

New Mexico's decades of experience achieving compliance with the Pecos River Compact provide an instructive example. Following the Court's decision in

Texas v. New Mexico, 482 U.S. 124 (1987), and appointment of a River Master to assure New Mexico's compliance with its delivery obligations under the Pecos River Compact, New Mexico has not only retained its sovereign authority over water use in the Pecos River Basin, it has adopted a systematic and creative approach to conjunctive management of surface water and groundwater use to assure compact compliance. Existing water rights in the basin were acquired and retired by the New Mexico Interstate Stream Commission ("NMISC"). A Settlement Agreement was entered into among the New Mexico State Engineer, NMISC, USBR, the Carlsbad Irrigation District and the Pecos Valley Artesian Conservancy District, with the goals of compact compliance and getting the basin back into hydrologic balance following groundwater pumping that had over-depleted the basin. *See* Greg Lewis, New Mexico Interstate Stream Commission, *The Pecos Settlement – Manage Conjunctively Or Else!*, 58th Annual New Mexico Water Conference, November 2013, at pp. 99-101.*[4] Additional irrigated land was acquired and retired; contracts with USBR were entered to allow reclamation project water (normally reserved for irrigation of project lands) to be used for Pecos River Compact deliveries; additional studies and modeling were

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[4] A copy of the Lewis article is available on the NMISC web site at: https://nmwrri.nmsu.edu/wp-content/uploads/2015/watcon/proc58_1/Lewis.pdf. Also, accompanying the filing of this brief, pursuant to Rule 32.3 the City of El Paso has submitted a letter to the Clerk of the Court describing additional documents proposed to be lodged with the Clerk, and has indicated with an "*" those materials when quoted herein.

undertaken; supplemental and augmentation wells were drilled and capacity assigned to NMISC to be available for delivery of water to meet compact obligations; and the duties of the State watermaster for the Pecos River were expanded. Settlement Agreement, March 25, 2003, at pp. 3-7.*[5]

The results of this multi-faceted effort by New Mexico and affected stakeholders were impressive. Since 1987, New Mexico has complied with its Pecos River Compact delivery obligations to Texas every year. Further, since the execution of the 2003 Settlement Agreement New Mexico has even accumulated a 100,000 acre-feet delivery credit that it can draw against for future deliveries. The graphic results of New Mexico using its sovereign authority to achieve, rather than frustrate, Pecos River Compact compliance are shown by Figure 7 from the Lewis paper, a copy of which is attached to this brief as Appendix 1.

The lesson from the Pecos River Compact compliance experience is that New Mexico needs to retain its sovereignty over water below Elephant Butte Reservoir in order to assure its ability to comply with its Rio Grande Compact obligations. Texas has not requested, and the Special Master has not recommended, that New Mexico be stripped of its sovereign authority to regulate water use in New Mexico. To be sure, that state-level authority is not unrestricted, but exercise of

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[5] A copy of the Settlement Agreement is also available on the New Mexico State Engineer's web site: http://www.ose.state.nm.us/Compacts/Pecos/PDF/settlement_03-25-2003.pdf.

that authority over other New Mexico water users is essential for New Mexico to achieve and maintain compact compliance.

3. Preserving the integrity of Project water supply is not incompatible with New Mexico's administration of state water rights.

Related to their respective arguments about "relinquishment," "divestment," and "complete abdication" of New Mexico's state sovereignty under the Report's analysis, New Mexico and several New Mexico *amici* argue further that the Special Master's recommendations and analysis would effectively "federalize" the Rio Grande Basin, and by extension set a troubling precedent affecting states and water rights involved with other federal reclamation projects. These arguments are particularly directed at the United States' pleadings and briefing positions regarding the requirement to contract with USBR in order to use Project water, including the types of hydrologically connected groundwater affecting the Project, at issue in this case. N.M. Br. at 27-28 n. 8, 22 (warning of "control and dominion [passing] silently to the United States"); Las Cruces Br. at 4 n. 3, 31, 37 (arguing the result that the United States would become "the administrator of water rights in the Lower Rio Grande"); ABCWUA Br. at 12, 32-38. The dire and dramatic picture painted by these arguments should be disregarded, because it distorts the Report's analysis and ignores how the Project water contract requirement could be reasonably applied to facilitate New Mexico's compact compliance.

The Rio Grande Project is El Paso's sole source of surface water supply, providing up to 70,000 acre-feet of water during years of full supply, and providing 50% or more of El Paso's total water supply. *See supra* note 2. As recognized by the Report, only entities having contracts with the United States may receive deliveries of water from a reclamation project. Report at 232 (citing *Bean v. United States*, 163 F. Supp. 838 (Ct. Cl. 1958) (citing *Ide v. United States*, 263 U.S. 497, 505 (1924))). Over the decades of development of the Project, El Paso has contracted with EPCWID and USBR to obtain its supply of Project water. These El Paso contracts provide a good example not only of how Project water supply can be used for purposes other than irrigation of Project lands, but also how other activities affecting Project water supply can be taken into account.

Water from a federal reclamation project may be sold and supplied for municipal purposes pursuant to the Act of February 25, 1920, 31 Stat. 451; 43 U.S.C. §521. *See El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 918-20 (W.D. Tex. 1955), *affirmed*, 243 F.2d 927 (5th Cir. 1957), *cert. denied*, 355 U.S. 820 (1957). Pursuant to that statute, El Paso has entered into a series of contracts with EPCWID and USBR to obtain Project water, through a variety of mechanisms:

1. *Ownership of land within EPCWID that is entitled to receive irrigation water, converting that water supply to municipal use. See* Contract No. I16r-1712 to Supply Water to the City of El Paso for Municipal Purposes, December 1, 1944 (authorizing El Paso to own

and obtain the water supply from up to 2,000 acres within EPCWID);* Contract No. 01-WC-40-6760 Implementing Third-Party Contract, June 11, 2001 (authorizing El Paso to obtain the Project water supply for an additional 1,000 acres within EPCWID).*

2. *Assignment of water supply rights from owners of small tracts (less than two acres) within EPCWID and also within El Paso's city limits that are entitled to a Project water supply. See* Contract No. 14-06-500-762 Permitting the City of El Paso to Acquire Additional Water Supply for Municipal Purposes, December 20, 1962.*

3. *Purchase of excess Project water that is not required for irrigation of Project lands within EPCWID. See* 2001 Implementing Third-Party Contract, §7.*

4. *City of El Paso's state water right. See* Certificate of Adjudication No. 23-5942,* for unappropriated storm, flood and return waters from the Rio Grande, issued pursuant to the Contract to Permit the City of El Paso to take Water from the Rio Grande when in Excess of Project Requirements, August 10, 1949, between EPCWID and El Paso, approved by the U.S. Secretary of the Interior.*

Additionally, El Paso obtains a supply of Project water from the Lower Valley Water District Authority ("LVWDA") also in El Paso County, which has its own similar contractual arrangements to obtain Project water from EPCWID and USBR. In that case, El Paso receives Project water supply in return for the potable water supply provided to LVWDA by the City. The City

could also obtain Project water supply through "forbearance agreements" with property owners within EPCWID, under which landowners would be compensated and agree to forego delivery of Project water for a period of time in order to make it available to the City; however, El Paso and EPCWID have not yet completed the necessary legal arrangements to exercise this option. *See* Contract No. 00-WC-40-R6460, Third-Party Contract, December 1, 1999.*

Like the groundwater pumping now occurring below Elephant Butte Reservoir in New Mexico by multiple entities and individuals, El Paso's pumping of groundwater from the Hueco Bolson and Mesilla Bolson in Texas impacts the delivery of Project water to EPCWID. This issue has been addressed and compensation provided for the impact on EPCWID, by several provisions of the 2001 Implementing Third-Party Contract, including:

1. El Paso agrees to provide 12,000 acre-feet per year of treated wastewater effluent from its Haskell Street Wastewater Treatment Plant between February 15th and October 15th of each year. 2001 Implementing Third-Party Contract, §8.* Depending upon the Project water supply then available and the amount of effluent discharged, El Paso receives a variable credit against its payment obligations to EPCWID for delivery of this effluent. *Id.* §9.C.*

2. El Paso agrees to provide treated sewage effluent from its other treatment plants in an amount equal to 25% of the Project water supplied by EPCWID, less a credit for the Haskell Street effluent. 2001 Implementing Third-Party Contract, §12.A.*

3. Underflow of the Rio Grande intercepted by El Paso's Mesilla Valley well fields is considered to be Project water delivered to the City, for which the City must pay the same rate as for other Project water delivered under this contract, unless the City discharges other usable sewage effluent equal to 1.6 times the amount of underflow pumped. 2001 Implementing Third-Party Contract, §12.B.* This contract also provides a specific procedure by which the amount of underflow captured by El Paso's wells is determined. *Id.* Exhibit C.*[6]

All of these arrangements assure that El Paso will compensate EPCWID, and by extension the United States, for the impact that El Paso's own groundwater pumping has on the Project water supply, either monetarily or with sewage effluent of acceptable quality.

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[6] Review of that exhibit demonstrates that El Paso's groundwater pumping does not have a one-to-one impact on Project water; in fact, less than one-third of the total groundwater pumped by El Paso is considered underflow, and El Paso's payment obligation is proportional to that. Similarly, El Paso anticipates that much of the groundwater production in New Mexico will not have a one-to-one impact on Project water.

Water rights adjudication and administration by the State of Texas is not displaced by these contractual arrangements or by the recognition of USBR's and EPCWID's rights in Project water supplies. Rather, these contracts are fully in accord with both applicable federal law and state water laws. Comparable arrangements may be possible for existing groundwater uses in New Mexico that impact Project water supplies. Of course, this does mean that New Mexico users may have to pay for Project water that has historically been taken without payment.

4. The Court's jurisdiction over claims based on Compact requirements does not threaten New Mexico's pending Lower Rio Grande Adjudication.

Both New Mexico and Las Cruces are anxious to ensure that prior rulings by the New Mexico state court in the pending proceedings to adjudicate claims in the Lower Rio Grande (the "LRG Adjudication") not be modified or supplanted by the Special Master's analysis or the Court's proceedings in this original action. On this issue, New Mexico's exceptions to the Report, and Las Cruces' supporting brief, further manifest their respective arguments regarding the interplay of federal reclamation law with state jurisdiction over water rights adjudication and administration, including arguments regarding loss of state sovereignty and so-called "federalization" of all water resources in the Lower Rio Grande. N.M. Br. at 36-42; Las Cruces

Br. at 29-37. New Mexico accedes to the Special Master's recommendation that the Court exercise its non-exclusive original jurisdiction under 28 U.S.C. §1251(b)(2) to hear the United States' reclamation law claims, but urges that the United States should be precluded from attempting to relitigate claims regarding the nature and scope of its "Project water rights" as determined in the LRG Adjudication. N.M. Br. at 1, 56-57 & n. 15; *see also* NMSU Br. at 3-4, 31-36. Las Cruces apparently does not accept New Mexico's qualified approach, arguing that granting jurisdiction over the United States' reclamation law claims invites the possibility that the United States prevails and becomes the "administrator of water rights in the Lower Rio Grande," with "an alternative permitting process by federal contract that supplants vested state rights and administration." Invoking the principles of *Colorado River* abstention,[7] Las Cruces seems to diverge from New Mexico and suggest that the Special Master's recommendation be rejected outright. Las Cruces Br. at 37.

Las Cruces' hyperbolic characterization of the effects of the Special Master's recommendation regarding the United States' claims should be rejected, and even New Mexico's milder assertions of concern for protecting state jurisdiction in the LRG Adjudication are not well founded. New Mexico's jurisdiction to adjudicate the Lower Rio Grande under New Mexico law, and thereafter to continue administration of water

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[7] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

users' rights under New Mexico law, is not a proposition mutually exclusive with the Court's jurisdiction to decide the issues of Compact compliance presented in this original action. The focus of this case is New Mexico's obligations under federal law, including the Rio Grande Compact, not to interfere with Texas' rights to Compact deliveries and not to interfere with the United States' operation of the Rio Grande Project. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (compact when approved by Congress becomes a law of the United States).

Nothing in the Report precludes New Mexico's courts, and the parties before them (including the United States and El Paso), from proceeding to litigate water rights claims *inter se* under New Mexico law, just as the Texas court has already done (including the United States) for the Upper Rio Grande in Texas. *In re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, Final Decree (327th Judicial Dist. Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006). Under the Court's *Hinderlider* precedent, however, an agreement made by compacting states for equitable apportionment of an interstate stream "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 105-06; *see also Elephant Butte Irr. Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36 (Ct. App. 1993) (citing *Hinderlider*).

Las Cruces' assertion that the United States' claims in this action are actually an attempt to relitigate and gain ownership and control over groundwater in storage in the Lower Rio Grande are wholly unsubstantiated. Las Cruces Br. at 31. As argued above, El Paso agrees that New Mexico must maintain its sovereignty over water resources in New Mexico, precisely so that it can devise and oversee appropriate strategies of its choosing to ensure its compliance with the Compact. As for "federalization" of water resources related to the Project and Compact compliance, as El Paso's own contract and water right history demonstrates, there is a middle ground within the statutory requirement for a federal contract to take and use Project water. New Mexico water users could contract with USBR, and EBID and/or its property owners entitled to receive Project water, for the extent that their actions detrimentally affect Project water supply, while taking appropriate compensatory action to avoid reducing deliveries to Texas.

CONCLUSION

For the reasons set forth above, as well as those set forth in the Reply to Exceptions filed by Texas, New Mexico and its supporting *amici curiae* entities have not established a legal or factual basis to reject or substantially disregard or modify the Report. The Special Master's recommendations and underlying analysis regarding New Mexico's Motion to Dismiss should be adopted.

Respectfully submitted,

DOUGLAS G. CAROOM*
SUSAN M. MAXWELL
BICKERSTAFF HEATH
DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
(512) 472-8021
dcaroom@bickerstaff.com

**Counsel of Record*

Counsel for Amicus Curiae

JULY 2017

APPENDIX TO BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS

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New Mexico's Cumulative Credits and Deficits for Pecos River Compact Deliveries

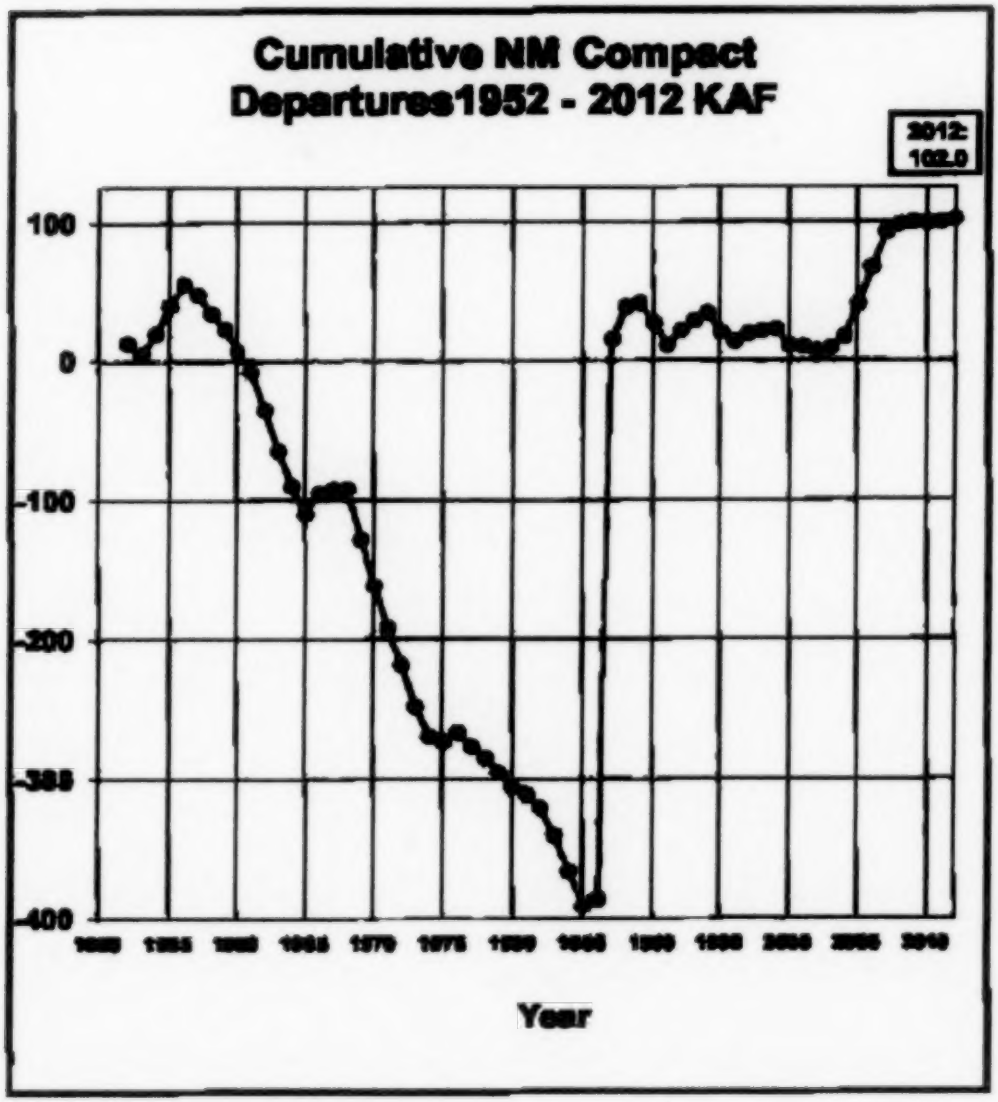

Figure 7. Compact Compliance Post-Settlement